STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2014
v	No. 315919 Oakland Circuit Court
KYLE H. COOPER, Defendant-Appellant.	LC No. 2012-241872-FC

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based convictions of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(e), third-degree CSC, MCL 750.520d(1)(b), assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g, and two counts of armed robbery, MCL 750.529. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 30 to 60 years' imprisonment on each count, to be served concurrently. We affirm.

Defendant's convictions arose out of assaults on three women, all of whom acknowledged that they had placed advertisements on adult websites. The women also acknowledged that they had willingly met defendant after he responded to their advertisements, and that they had expected to provide sex in exchange for money. Defendant testified that he contacted all three women after he saw their advertisements, and that he sought to pay them for sexual acts.

On appeal, defendant first argues that the trial court erred by ruling that the preliminary examination testimony of one of the women could be read into evidence at trial. The trial court found that the woman was not available for trial, and accordingly allowed the preliminary examination testimony into evidence. We review the trial court's ruling for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). To the extent the ruling presents a constitutional issue, we review the preserved issue to determine whether the prosecution has established that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find no abuse of discretion in the trial court's ruling. Under MRE 804(b)(1), a witness's prior testimony is not excluded by the hearsay rule if the witness is unavailable for the current proceeding and "the party against whom the testimony is now offered . . . had an

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A witness is unavailable to testify if the witness "is absent from the hearing and the proponent of a statement has been unable to procure the [witness's] attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

In this case, the prosecution attempted to procure the witness's attendance at trial. The record indicates that the Southfield police had personally served the witness for jury trials in January and February 2013, and that those trials were adjourned at defendant's request. When Southfield police sought to serve the witness again in March 2013, they discovered that she no longer resided at the address they had for her, the home appeared to be vacant, and her telephone number was no longer operable.

Defendant cites *Bean*, 457 Mich 677, *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), and *People v James (On Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), to support his argument that the police did not make diligent efforts to locate the witness for trial. The cases do not support defendant's argument. In *Dye*, 431 Mich at 76, our Supreme Court determined that the prosecution had not used due diligence to locate the witnesses, because the prosecution made belated and incomplete efforts to locate the witnesses who had an incentive to go into hiding. *Id.* In this case, the prosecution had no reason to believe that the witness would be difficult to locate. She had testified at the preliminary examination and had been served with subpoenas twice in the two months before trial. Therefore, *Dye* does not indicate that the trial court erred in this case.

In *James*, 192 Mich App at 572, this Court determined that the prosecution's efforts were not sufficient where the police had no contact with the witness for 3½ years and did not make an effort to locate the witness before the first day of trial, even though the witness had not responded to a mailed subpoena. The *James* Court found that the prosecutor should have known the witness might have changed addresses and would be difficult to locate after 3½ years. *Id.* In contrast, the police in this case had previously served the witness with subpoenas.

In *Bean*, 457 Mich at 685-690, upon first contact with the later missing witness, police obtained the witness's identifying information along with the name of his grandmother, with whom the witness lived, her address, and telephone number. Police also obtained the address and telephone number of the witness's mother. Shortly before trial, police learned both telephone numbers had been disconnected. They went to the witness's mother's house and learned from neighbors that she moved to Washington D.C. and may have taken the witness with her. Police never went to the grandmother's address, never made contact with anyone in Washington D.C., and never contacted the telephone company or postal service for forwarding information. The *Bean* Court found these efforts were insufficient to constitute due diligence, stating that police "took no steps whatsoever to locate [the witness] or his mother in the area to which they had evidently moved." *Bean*, 457 Mich at 690. The *Bean* Court also ruled that this error was not harmless where cross examination of the witness at the preliminary examination was limited and brief. *Id.* In this case, Southfield police went to the witness's home but did not speak to neighbors. The record does not indicate that the police had any reason to believe that the witness would be difficult to locate.

Defendant contends that the police knew one month before trial that the witness's telephone number had been disconnected and that her house was vacant. Defendant argues that

the police should have made additional efforts to locate the witness during that month, such as contacting the postal service for a forwarding address. Even if defendant were correct, the lack of these efforts by the police was harmless error. Defense counsel fully cross-examined the witness at the preliminary examination, and replacement trial counsel acknowledged that the cross-examination was excellent. Therefore, even if the trial court erred by finding that the police used due diligence, the cross-examination from the preliminary examination renders the error harmless.

Next, defendant argues that his trial counsel was ineffective for failing to seek severance of the offenses. We review this issue for errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (citations omitted). A defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant has not established ineffective assistance of counsel, because a motion to sever would have been futile. MCR 6.120(B)(1) provides that joinder of offenses if the offenses "are based on (a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting part of a single scheme or plan." In this case, the allegations of the three women were very similar, as were the charged offenses. The similarities in the complainants' allegations indicate that defendant had a common scheme or plan in finding women through adult websites, contacting them and asking for paid sexual acts, luring them to the laundry room of an apartment complex, sexually assaulting (or attempting to sexually assault) the women, and, in two instances, stealing their money. Because the offenses were related by a common scheme or plan, joinder was appropriate under MCR 6.120, and a motion to sever the offenses would have been futile. Counsel was not ineffective for failing to make a futile objection. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Defendant next argues that the prosecutor committed misconduct and violated defendant's due process rights by asking him about his prior convictions. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue could result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 235 (citation and quotation marks omitted).

Defendant does not argue that his prior uttering and publishing convictions were not admissible under MRE 609(a)(1). Instead, he argues that the prosecutor's questioning about the convictions amounted to prosecutorial misconduct. We disagree. "Evidence of prior convictions is always admissible to show perjured testimony of the defendant regarding the existence or nature of prior convictions." *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985).

Defendant raises additional issues in a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4. First, defendant contends that his preliminary examination counsel was ineffective for failing to request a polygraph examination. MCL 776.21(5) provides: "A defendant who allegedly has committed a crime under sections 520b to 520e and 520g of Act No. 328 of the Public Acts of 1931, shall be given a polygraph examination or lie detector test if the defendant requests it." Defendant did not request a polygraph test in this matter; the record indicates that the lack of a polygraph request was a matter of trial strategy. Even if counsel's failure to request a polygraph test was deemed to fall below an objective standard of reasonableness, the likelihood that the outcome of the proceedings would have been different is slim, given strikingly similar allegations against defendant by each of the three women.

Defendant next argues in his Standard 4 brief that his trial counsel was ineffective for failing to impeach the complainants with prior inconsistent statements. Generally, a trial attorney's "decision not to delve into all differences constitutes a matter of trial strategy for which this Court will not substitute its judgment." *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). The inconsistencies in the complainants' statements were minor, and trial counsel cross-examined the complainants under the theory that they were lying because defendant had not paid them for their illegal services, rather than grilling them about inconsistencies in how the sexual assaults occurred. Trial counsel's performance was a matter of trial strategy and did not fall below an objective standard of reasonableness. *Strickland*, 466 US at 689.

Defendant also argues that his trial counsel was ineffective for failing to present exhibits, to call witnesses, and to obtain the complainants' telephone records and 911 tapes. First, defendant does not describe what exhibits should have been presented. On the record before this Court, there is no obvious exhibit that would have resulted in a different outcome in proceedings. Therefore, trial counsel was not ineffective for failing to introduce exhibits. Similarly, the failure of trial counsel to call witnesses is ineffective assistance only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant does not name any witnesses, other than his father, who would have testified. Defendant claims that his father would have testified that he owned the gun and ammunition found in the apartment, rather than defendant. However, defendant testified that the gun box and ammunition in the apartment belonged to his father. Defendant's father's testimony would have been cumulative; defendant was not deprived of a substantial defense. *Id.*

Defendant also argues that his trial counsel was ineffective for failing to obtain the complaining witnesses' telephone records and 911 tapes. Defendant does not explain how these items would have benefited his defense. Defendant admitted calling the women, and there was no question that the women called 911. Because defendant does not explain how the telephone records and 911 tapes would have changed the outcome of proceedings, he has not established ineffective assistance of counsel on this basis.

Defendant also argues that his counsel was ineffective for failing to prepare him to testify, specifically regarding several areas of impeachment. The areas of impeachment included lying to police about using the name Jay, lying about the use of condoms with the complainants, and similar matters. The record does not contain any evidence of how or whether trial counsel

prepared defendant for testifying at trial; however, trial counsel did file a motion in limine in an attempt to preclude impeachment of defendant with his prior convictions. Further, defendant thoroughly explained his version of events. Defendant has not explained how further preparation by trial counsel would have changed his testimony or how, if trial counsel had prepared him to testify, there would have been a reasonable probability that the outcome of his trial would have been different.

Lastly, defendant argues that the trial court erred in scoring Offense Variables 4, 8, and 10. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

Offense Variable (OV) 4 requires the sentencing court to determine the victim sustained a serious psychological injury requiring professional treatment. MCL 777.34. "The victim's statement about feeling angry, hurt, violated, and frightened support [an OV 4] score under our case law." *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012). No proof of professional treatment is required to assess points under OV 4. *People v Lockett*, 295 Mich App 165, 182-183; 814 NW2d 295 (2012).

One of the women testified that defendant pushed her into the laundry room, shut off the light, and pointed a large knife at her. She further testified that she begged him not to hurt her, and that she was terrified. This testimony was sufficient to establish serious psychological injury. Accordingly, the trial court did not clearly err in assessing 10 points for OV 4.

OV 8 requires the assessment of 15 points if a "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to complete the offense." MCL 777.38(1). This Court has determined that the term "place of greater danger" includes "an isolated location where criminal activities might avoid detection." *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013). The trial evidence demonstrates that defendant pushed at least one of the women into a laundry room of an apartment building, which was an isolated location. Therefore, the trial court did not clearly err in assessing 15 points for OV 8.

OV 10 requires the assessment of 15 points if the offense involved predatory conduct. MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). In each of the offenses, defendant testified that he found the complainants' advertisements on the internet, called them, and invited them to his apartment building for sex in exchange for money. Defendant claims that his actions in searching adult websites, contacting the women, and inviting them to his location was not predatory conduct but was merely an attempt to hire the complainants for sex. The record supports the sentencing court's determination that defendant's plans to lure the women into violent sexual assaults was predatory conduct. As such, the trial court did not err in assessing 15 points for OV 10.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell